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Issue Date: 10 January 2006

CASE NO: 2005-LHC-77

OWCP NO: 14-129914

In the Matter of:

RONALD LELAND,
Claimant,

v.

REEDSPORT MACHINE & FABRICATION, et. al.
Employer,

SAIF CORPORATION,
Carrier.

Appearances:

Richard A. Mann, Esq.
for Claimant

Norman Cole, Esq.,
for Employer and Carrier

Before: **Gerald Michael Etchingham**
Administrative Law Judge

DECISION AND ORDER

This case arises under the Longshore and Harbor Workers' Compensation Act ("the Act"), as amended, 33 U.S.C § 901 *et seq*. Ronald Leland ("Claimant") seeks compensation and medical benefits for his back condition, claiming that it is causally related to or is an aggravation of a back injury sustained in the course and scope of his employment with Reedsport Machine and Fabrication, *et al.* ("Employer") in Winchester Bay, Oregon.

At the formal hearing on May 9, 2005 in Portland, Oregon, Claimant's Exhibits ("CX") 1 through 28 were admitted into evidence, with the videotaped deposition of Dr. Jeffrey K. Bert, dated April 18, 2005, designated as "CX 28" at the hearing. TR at 6. Employer's Exhibits ("EX") 1 through 77 were also admitted. TR at 5. Claimant's pre-hearing statement, witness list,

and exhibit list were identified and admitted as Administrative Law Exhibits ("ALJX") 1 through 3. Employer's pre-hearing statement and the last page of the pre-hearing statement containing Employer's supplemental statement of issues and SAIF ("Carrier")'s witness list were admitted as ALJX 4 and 5, respectively. SAIF's exhibit list, marked as ALJX 6, was withdrawn because Employer submitted an updated exhibit list, ALJX 3, which was duplicative of ALJX 6. TR at 10.

The parties were represented by counsel. At the close of the hearing, the record was left open for submission of post-trial briefs, which were filed by both Claimant and Employer on July 8, 2005 and became part of the record as ALJX 7 and 8, respectively.

STIPULATIONS

At the hearing, the parties stipulated to the following:

1. The Act is applicable to Claimant's claim.
2. An employer/employee relationship existed between Claimant and Employer at the time of the Claimant's injury on March 1, 1999 in Winchester Bay, Oregon.
3. Claimant's injury arose out of and was in the scope of his employment with Employer.
4. Claimant timely filed and timely noticed the claim.
5. Employer had notice of the injury on March 1, 1999.
6. Claimant was temporarily totally disabled due to the injury from March 5, 1999 through March 17, 1999.
7. Claimant's average weekly wage was $596.27 per week, calculated under subsection 10(c) of the Act and based on his earnings at the time of the March 1, 1999 injury.
8. Claimant has not received compensation for any outstanding medical bills.

TR at 11-17; ALJX 4; CX 9; CX 10 at 20, 23; CX 11 at 31; CX 15 at 52; CX 16 at 53; EX 31; EX 32; EX 39; EX 43; EX 72. Because there is substantial evidence in the record to support the foregoing stipulations, I accept them.

ISSUES

1. Whether Claimant's back condition at any time after April 2, 1999 is causally related to, or is an aggravation of Claimant's March 1, 1999 injury sustained during the course of his employment with Employer;
2. Whether Claimant's October 1, 1999 motor vehicle accident is an intervening cause of Claimant's current back condition;
3. What is the nature and extent of Claimant's disability;
4. Whether Claimant is entitled to medical expenses under section 7 of the Act.

SUMMARY

Claimant has a pre-existing low back condition, dating back to 1989, when he was first diagnosed with degenerative disc disease. There is also some indication that his low back pain was exacerbated in 1992 when Claimant fell off a ladder while employed by Employer. On

March 1, 1999, Claimant also sustained a low back injury while lifting a tow dolly ramp while employed by Employer, which is the injury at issue here. Claimant went off work on temporary total disability on March 5, 1999 and returned to work on March 17, 1999. Claimant worked for approximately another five months before sustaining various injuries to his head, neck, shoulder, knee, and low back in a motor vehicle accident on October 1, 1999. Claimant was out of work for three months following the motor vehicle accident and returned to work in January 2000. Claimant has had low back pain since returning to work through the present. Claimant has been recommended for back surgery in the near future for his current low back condition and brings a claim for appropriate temporary total disability, and permanent disability, if appropriate, after the performance and recovery from any future surgery, as well as payment of any past outstanding medical bills.

FINDINGS OF FACT

Claimant, born April 22, 1953, has worked for Employer as a certified journeyman machinist for over 20 years. TR at 41. Employer does job shop work. TR at 42. Claimant fixes various things, including motor lifeboats and fishing boats. TR at 42-43. Claimant performs propeller shaft maintenance on the boats, as well as any mechanical work that needs to be done, such as welding, machining, electrical, painting, and sandblasting work. TR at 43. This requires that Claimant crawl around in bilges and try to loosen rusted bolts and nuts down in tight spaces. *Id*. Claimant testified that he spends 50 percent of his time crawling around or in boats, with the other 50 percent of his time spent standing at a work bench or running machinery, with a small percentage of time spent guiding the travel lift with a boat on it. TR at 48. As part of his welding responsibilities, Claimant also builds tow dollies at his work bench. TR at 52.

1. *Claimant's Medical History*

Claimant has an extensive medical history, and has had pain in his back since 1989, according to his medical records.

On March 27, 1989, Claimant was treated by Dr. John Crocker, M.D., his primary care physician at Dunes Family Health Care in Reedsport, Oregon, for back pain that started when Claimant twisted his low back while getting out of bed. Dr. Crocker assessed that Claimant had low back strain with spasm but there was no known injury. CX 1 at 1. On a follow-up visit on April 3, 1989, Dr. Crocker assessed that Claimant's X-ray indicated degenerative disc disease and disc space narrowing at the L4-5 level. Claimant was given pain killers and muscle relaxants, as well as bed rest for two days, along with a light duty work restriction. CX 1 at 2; CX 2 at 5.

On February 2, 1992, Claimant saw Dr. Robert Levy, M.D, a board-certified physician and surgeon in internal medicine at the North Bend Medical Center in Coos Bay, Oregon, who took a complete history and conducted a physical examination of Claimant. In Dr. Levy's examination of Claimant's musculoskeletal area, he noted that Claimant had "a little bit of low back pain." Nothing further was referenced in regards to Claimant's low back. EX 6 at 6-7.

On April 21, 1992, Claimant sustained a work-related injury to his neck and shoulders when he fell off a ladder ("1992 ladder accident"). TR at 60; CX 4 at 7; EX 7 at 9. Claimant testified that he was coming down a ladder with a bucket full of tools while working on a fishing boat, and he fell off the ladder and onto the back of his head and neck. TR at 60. Claimant fell about 10 feet from the ladder, hitting the asphalt on his occipital head region, neck, and shoulder. Claimant was briefly knocked unconscious, and felt "odd, strange and light-headed" but was able to drive himself to the hospital. Claimant missed seven days of work due to the pain in his occipital head region, neck, shoulder, and one leg. His symptoms after the injury consisted of headache, dizziness, difficulty concentrating, and disturbed sleep. Claimant's neck injuries eventually led to a neck surgery in 1996. TR at 61; EX 19; EX 20.

On April 24, 1992, Dr. Robert Levy examined Claimant following the 1992 ladder accident and assessed that he had some trauma with a concussion giving him some dizziness. Dr. Levy concluded that Claimant had a normal neurological exam but that he should consult with a neurologist if he worsened in any way. EX 8 at 11.

On August 3, 1992, Claimant underwent a neurological examination with Dr. Yung Kho, M.D., a neurologist in Grants Pass, Oregon. Dr. Kho opined that Claimant's cervical spine MRI taken after the 1992 ladder accident was essentially within normal limits. He diagnosed that Claimant's status was post mild cerebral concussion, which was resolved and stationary. Dr. Kho concluded that Claimant had some mild, residual, post-traumatic vertigo and headaches, but that they would resolve, making him medically stationary. EX 10 at 17-18.

On May 13, 1993, Claimant underwent a neurological consultation with Dr. Mark Herring, M.D., a private physician specializing in neurology in Springfield, Oregon, in relation to the 1992 ladder accident. Dr. Herring focused on Claimant's intermittent headaches and associated dizziness because these were his major pain symptoms from the 1992 ladder accident. Dr. Herring did indicate, however, at the end of his examination report that Claimant also complained of low back pain after activities such as lifting. Dr. Herring examined Claimant and found him to have some diffuse tenderness of the lumbosacral region but with full range of movement and negative straight leg raising. CX 4 at 9. Dr. Herring's conclusion was that Claimant had some new neck pains since the 1992 ladder accident but that a neurological review of his systems was otherwise unremarkable. His impression was that Claimant had symptoms consistent with a post-concussive syndrome and post-traumatic headache disorder, but that his neurological examination was nonfocal. Dr. Herring disagreed with Dr. Kho and opined that Claimant was not medically stationary in regards to these symptoms, and that Claimant could improve with further treatment or the passage of time. As a result of his visit with Dr. Herring, Claimant decided to try abortive therapy for his headaches. CX 4 at 8-9.

Claimant continued to experience neck pain and secondary headaches through 1995. On May 26, 1995, Dr. Crocker assessed that Claimant had chronic neck pain, temporally related to his 1992 ladder accident and recommended further X-rays and treatment. EX 12 at 22.

On June 29, 1995, Dr. Jeffrey Bert, M.D., a physician and orthopedic surgeon, examined Claimant with South Coast Orthopedic Associates in Coos Bay and evaluated his symptoms of neck discomfort. CX 24. Dr. Bert's impression was that Claimant had a cervical disc syndrome,

and he recommended an MRI for further elucidation before starting a conservative treatment program. EX 13 at 23-24.

On October 12, 1995, Dr. Robert Hacker, M.D., a physician and surgeon with the local Neurosurgery Specialists group in Eugene, Oregon, examined Claimant's MRI (the "1995 cervical MRI") and assessed whether his cervical disc hernia needed surgical treatment. Dr. Hacker opined that Claimant's radicular pains were resolved with a physical therapy program and that surgery was not needed. He conceded that Claimant still had pain in his thoracic and cervical spine region, but that the pain was not related to the cervical disc hernia, but rather to soft tissue injury and diffuse degenerative disc. EX 14 at 25.

On November 6, 1995, Dr. Hacker confirmed that Claimant's 1992 ladder accident was the cause of his cervical disc herniation. Although Claimant also had degenerative disc disease, Dr. Hacker stated that this was not a symptomatic condition in the vast majority of patients. He also stated that, given that Claimant had no symptoms prior to his 1992 ladder accident, his cervical radiculopathy was due to that injury. EX 15 at 26-27.

On June 20, 1996, Claimant was examined by Dr. Christopher Miller, M.D., at Neurosurgery Associates of Lane County in Lakeside, Oregon to undergo an evaluation for neck surgery. At this point, Claimant was taking Volteran, Vicodin, Soma, and Glucotrol, and was having chronic pain in his neck. Dr. Miller recommended surgery for the symptomatic C7 radiculopathy only at that time, and not the disc herniation at C6-7 or the smaller one at C5-6. EX 18 at 42-43.

On July 15, 1996, Claimant underwent neck surgery. Dr. Miller performed an anterior cervical discectomy and fusion at C5-6 and C6-7. Although Dr. Miller had originally recommended surgery for C7 only, Dr. Miller operated on both levels, due to surgical findings. Upon discharge from surgery, Dr. Miller gave Claimant a work restriction of 4 hours a day and a lifting restriction of 10 lbs, and instructed him to carry out self-treatment exercises. EX 19 at 44-45; EX 20 at 46.

On January 14, 1997, Dr. Miller opined that Claimant was medically stationary with regard to his neck condition. Dr. Miller modified Claimant's work restrictions to rare lifting (no more than 3 times a day) up to 100 lbs and no repetitive lifting over 50 lbs, and directed him to avoid contorted and extreme neck positions. Dr. Miller lifted Claimant's time constraints for work activities. EX 22 at 52. Claimant testified that he was able to comply with these restrictions saying "I work to the best of my ability and receive help all the time." TR at 73-74.

On December 22, 1997, Claimant sought treatment from Dr. Bert for hip and leg pain. Claimant informed Dr. Bert that he was having trouble bending, stooping, or sitting too long. Dr. Bert noted that Claimant had trouble bending, and that X-rays showed severe spondylosis and disc degeneration at L4-L5 and foraminal spurring. Dr. Bert recommended an MRI. CX 5 at 10; EX 23 at 53;

On December 23, 1997, Claimant underwent a lumbar spine MRI examination (the "1997 MRI"). The MRI showed mild circumferential disc bulging at L3-4 level and moderate central

disc protrusion at L4-5 level. No other abnormalities were present. CX 6 at 11; EX 24 at 54. Dr. Bert later interpreted the 1997 MRI, opining that it "shows a large disc herniation at L4-5 and to a lesser degree at [L]3-4." EX 25 at 55.

In January 1998, Dr. Bert recommended surgery as a reasonable option because he thought Claimant had sciatica, a neurologic finding of a disk herniation.[1] CX 25 at 137-38. At that time, Dr. Bert also noted that Claimant had positive results on his straight leg raising and a positive Spurling sign in support of Claimant's need for lumbar spine surgery. CX 25 at 139-40.

On January 1, 1998, Dr. Bert recommended conservative treatment including painkillers, heat, and massage. CX 7 at 12. On April 8, 1998, Dr. Bert noted "slow improvement", but that Claimant still had some sciatica and was continuing his therapy program. CX 7 at 13; CX 25 at 138-39.

On May 20, 1998, Dr. Bert opined that Claimant was medically stationary in regards to his low back pain. Dr. Bert denied Claimant's request for pain medication and told him that he could only have anti-inflammatories. Claimant elected to live with the problem and continue working at that time. CX 7 at 14; EX 27 at 57.

On September 21, 1998, Claimant made a clinical visit to the Peacehealth-Health Associates Center in Florence, Oregon, and was treated by Dr. Anthony Dodson, M.D[2]. In addition to concerns about his diabetes, Claimant sought treatment for his continuing low back pain and told Dr. Dodson that he had a ruptured disk. CX 8 at 15. Claimant informed Dr. Dodson that Dr. Bert had refused to refill his medication and just wanted to "cut on him." Dr. Dodson refilled Claimant's pain medication based on Claimant's claim that he was only using about 4-5 tablets in an entire week. CX 8 at 15; EX 28 at 58. Dr. Dodson opined that Claimant did not "have any particular radiculopathy" at that time, but he believed that Claimant's back condition would "need to be followed." CX 8 at 15-16.

2. *The March 1999 Injury*

On March 1, 1999, Claimant sustained an injury to his low back in the course and scope of his employment (the "March 1999 injury") in Winchester Bay, Oregon while working at his workbench welding a ramp for a tow dolly. TR at 11, 52. When he lifted a piece up and put it on the bench to weld it, something snapped in his lower back and caused him pain. TR at 51-52. Claimant told his supervisor and then went to the emergency room at Lower Umqua Hospital. TR at 52. At the emergency room, he was treated by Dr. Jane Patten, who diagnosed him with a lower back sprain. EX 30 at 60. Dr. Patten authorized three days off work, but Claimant realized that he could not go back to work because he "couldn't walk and was all hunched over." EX 30 at 60; TR at 53.

[1] Dr. Bert later testified, however, that Claimant did not have evidence of sciatica on May 20, 1998. TR at 75; CX 25 at 139-41; EX 27 at 57.

[2] Claimant and his family had been receiving medical care from Dr. Dodson for approximately fifteen years as of 2005. *See* EX 76 at 143.

Claimant testified that he then went to see Donald Fisher, F.N.P., a nurse practitioner by taking his wife's appointment because he knew it would take too long to get an appointment with his primary care physician. TR at 53-54. On March 3, 1999, Donald Fisher authorized a one week work release for Claimant and referred him to a chiropractor. EX 33 at 63; TR at 54.

Claimant did not go see the recommended chiropractor but decided to take his wife's chiropractic appointment with Norman Rabin, D.C., a chiropractor with the Coos Chiropractic Clinic, P.C in Coos Bay. On March 5, 1999, Chiropractor Rabin treated Claimant for his low back pain, made a diagnosis of acute T/1 (first thoracic vertebra) and L/P strain, a course of chiropractic treatment was initiated, and Chiropractor Rabin released Claimant from work until he recovered sufficiently to do his normal working duties. EX 35 at 70-71.

On Claimant's follow-up visit on March 8 1999, Chiropractor Rabin noted Claimant had a good response to chiropractic treatment, with a "significant improvement" of 25 percent. CX 10 at 24; EX 36 at 72. Claimant's extremely sharp pain had been relieved, but he remained very sore and very stiff. EX 36 at 72.

At the next chiropractic visit on March 12, 1999, Claimant was doing "quite a lot better." Chiropractor Rabin noted that he would consider releasing Claimant for light duty work if Claimant could work only at the mill and lathe, tasks which would not require him to be in awkward positions or do a lot of bending, lifting, or twisting. CX 10 at 25; EX 37 at 73. At that time, Chiropractor Rabin reported that Claimant's pain level was much improved, but he was still quite sore and had trouble moving about, especially bending and twisting. *Id*.

Claimant received temporary total disability benefits from Employer for the March 1999 injury from March 5, 1999 to March 16, 1999 based on an average weekly wage of $596.27, at a compensation rate of $397.51 per week, for a total of $681.45. EX 38 at 74-75; EX 39 at 76; EX 43 at 80; TR at 13.

On March 16, 1999, Chiropractor Rabin released Claimant to return to light duty work. CX 10 at 26; EX 40 at 77. On March 19, 1999, Chiropractor Rabin indicated that Claimant was doing "a little better" and was doing light duty work, but that he still had pain in his back and was tolerating the pain. CX 10 at 27; EX 41 at 78.

On March 26, 1999, Chiropractor Rabin noted that his chiropractic exam showed Claimant's "tendency towards localization of physical findings with dysarthria[3] still present in the left L/P, r[igh]t low back, and T/L areas," and that they corrected "very nicely with chiropractic adj[ustment] techn[ique] with good releases." CX 10 at 28.

On March 30, 1999, Claimant had another follow-up visit with Chiropractor Rabin, who noted that Claimant had "improved symptomatically." He made adjustments to Claimant's lower T (thoracic), L (lumbar), and S1 (first sacral vertebra) joints, and stated that these areas

[3] "Dysarthria" is defined as a speech disorder consisting of imperfect articulation due to loss of muscular control after damage to the central or peripheral nervous system. *Dorland's Illustrated Medical Dictionary*, W.B. Saunders Co., 29th Ed. 2000. I find that use of the term "dysarthria" in Chiropractor Rabin's report is in error and not applicable to Claimant as there is no subjective or objective evidence presented to support this diagnosis.

mobilized nicely. Chiropractor Rabin opined that Claimant had improved sufficiently to return to full duty work, and he released Claimant to full duty work. CX 10 at 29; EX 44 at 81.

Chiropractor Rabin's examination revealed normal ranges of motion "without catch or fixation" noting no evidence of local muscle spasm or myofascial discomfort. Claimant had flexion of 50 degrees, extension of 7 degrees, lateral bending of 15 degrees/15 degrees with normal straight leg raising and a pain free range of motion. EX 23 at 92.

On April 2, 1999, Chiropractor Rabin treated Claimant for the last time, and stated that Claimant had been doing reasonably well since he was last seen and was doing full duty work with no new restrictions. Chiropractor Rabin noted that Claimant was back to working in awkward positions leading to sore shoulders, but that his lower back had continued to do reasonably well. Chiropractor Rabin opined that Claimant was now medically stable and that he could be released from treatment due to the lack of permanent impairment. CX 10 at 30; EX 45 at 82. Claimant also testified that Chiropractor Rabin got him to "where [he] could walk again and let [him] go back to work." TR at 55.

Claimant testified that he continued to feel pain in his low back, arms, neck, and head for the next 5 months or so after getting treatment from Chiropractor Rabin, but did not wish to return to seek chiropractic treatment. Claimant admitted that he "never had a whole bunch of faith in chiropractors." TR at 55-56, 77-78.

On July 27, 1999, Dr. Dodson referred Claimant to Dr. Raymond Englander, M.D., a neurologist at Neurology Associates, P.C in Eugene, Oregon[4], primarily due to Claimant's recurrence of cervical and bilateral arm pain with headaches. TR at 76-78; CX 12 at 32. At that time, Claimant also mentioned his continued low back pain. CX 12 at 32. Specifically, Dr. Englander indicated that:

> Over the last three to four months, however, he [Claimant] has felt several things occurring; he has been having increasing neck pain with bilateral arm pain, very similar to the symptoms he had prior to his [anterior cervical discectomy and fusion in late 1995 or 1996 along with either a Steffe or Leuke plate from C5-C7]. There is some occasional tingling of his hands when he uses his hands excessively. He has been having some headaches at the base of the skull, posteriorly.
>
> In addition, possibly related but not clearly, he [Claimant] has had some low back pain which he relates to lifting some sort of device while on the job. He saw a chiropractor and continued to have the low back pain with some vague radiation but without sensory, bladder, bowel, or other symptoms in the lower extremities. CX 12 at 32;.EX 46 at 88.

At that time, Dr. Englander's impression, based on Claimant's history, the exam, and previous cervical and lumbar MRIs, was that Claimant had: (1) recurrent progressive bilateral neck and upper arm pain; (2) a report of the abnormal recent cervical MRI scan at T1-2 on the

[4] Dr. Englander identified Claimant as "the husband of a patient I have followed for quite some time" in reference to Claimant's wife. EX 46 at 83.

right; (3) lumbar MRI findings suggestive of a right lumbar radiculopathy; and (4) that the 1997 MRI indicated a moderately large disc herniation at L4-5, which had become more symptomatic around the time he treated Claimant. CX 12 at 34; EX 46 at 85.

On October 1, 1999, Dr. Dodson saw Claimant for a follow-up visit related to the March 1999 injury. Claimant told Dr. Dodson that he was still working full-time, and using a lot of medications, up to two to three Soma and Vicodin per day. Dr. Dodson observed that Claimant was very uncomfortable, moved about the room quite stiffly, and couldn't stand up or walk normally. EX 47 at 86. Dr. Dodson did not examine Claimant, record any objective measurements, or obtain reliable testing data to confirm Claimant's back condition that day. He opined that Claimant was having chronic neck pain and increasing low back symptoms, and stated that a new lumbar MRI for the Claimant would be reasonable. *Id*. Dr. Dodson also wrote up a new medication contract for Claimant. *Id*.

On October 4, 1999, Claimant underwent his another lumbar spine MRI examination (the "1999 MRI"). It showed degenerative disc disease at the L3-4 and L4-5 levels with mild acquired spinal stenosis at the L3-4 level and moderate acquired spinal stenosis with considerable generalized protrusion of disc material at the L4-5 level, but a specific focal herniation was not identified. The MRI report was reviewed, interpreted, and signed by Dr. James Manwill, M.D., at the Peace Harbor Hospital in Florence, Oregon. EX 48 at 87.

3. The October 1999 Motor Vehicle Accident

On October 8, 1999, Claimant was involved in a non-work-related motor vehicle accident (the "October 1999 MVA"). TR at 57-58. Claimant testified that he was driving down a gravel road in his S-10 Chevrolet pickup truck when he approached a sharp blind corner. Claimant stated that he was traveling at about 30 mph, when a large van traveling faster than he was came "screaming" around the corner without putting its brakes on and smashed into Claimant's truck. TR at 57-58; 78-79; EX 49 at 88. Claimant went to the ER after the accident, and testified that he "hurt all over…knee, neck, right shoulder, chest, whole body." TR at 58.

On October 13, 1999, Claimant had follow-up treatment from the October 1999 MVA with Dr. Dodson, who reported that Claimant had significant complaints of headaches, right leg pain, especially the right knee, increasing low back pain, and significant neck pain. Dr. Dodson assessed that Claimant had multiple strains and contusions, with the most serious being the neck and the knee. EX 49 at 88. Less serious were the low back and chest wall. Dr. Dodson ordered another MRI for the neck, since it had been a problem in the past. He gave Claimant pain relief injections, and noted that Claimant was going to see his neurologist regarding his neck and low back. Dr. Dodson concluded that seeing the neurologist had more to do with the March 1999 work-related injury, and that he expected the symptoms from the October 1999 MVA to resolve within one to two weeks. EX 49 at 88-89.

On October 18, 1999, Claimant visited Dr. Dodson again due to significant discomfort in his neck, shoulders, and knee. Claimant was found to have restricted range of motion in his neck, especially with flexion. Claimant also remained very tender over his trapezius muscles bilaterally, down towards the rhomboid marked spasm with additional knee swelling. EX 50 at

90. Dr. Dodson noted that whiplash from the October 1999 MVA was complicating his previous neck problems, and he prescribed some Dalmane to help Claimant with his sleep disturbances. Dr. Dodson decided to keep Claimant off work until at least his next follow-up visit. *Id.*

On October 26, 1999, Claimant was examined by Dr. Englander, who assessed that the October 1999 MVA had exacerbated his neck and lumbar pain and had created no specific radicular pain. Dr. Englander ordered a new MRI scan ("2nd 1999 MRI"), which showed no change from the past. He concluded by agreeing with Dr. Dodson that the soft tissue trauma from the October 1999 MVA would resolve over time with conservative management. He also noted that Claimant was receiving physical therapy and medications from Dr. Dodson. Dr. Englander did not make any additions to Claimant's treatment plan from the October 1999 MVA. CX 12 at 35.

On October 27, 1999, Dr. Dodson examined Claimant again due to significant discomfort from his neck strain. Dr. Dodson noted that conservative treatment was still proper and that Claimant was showing "mild improvements and was quite happy at this point." Dr. Dodson stated that Claimant should remain off work and continue physical therapy three times a week. EX 52 at 92.

On November 29, 1999, Dr. Dodson examined Claimant for another follow-up due to the October 1999 MVA. Dr. Dodson noted significant discomfort in Claimant's neck and low back, even though he was improving with physical therapy. Dr. Dodson assessed that Claimant's neck and low back conditions were complicated by the fact that he had previous problems in these areas. He opined that a key factor was that Claimant was working with these injuries prior to the MVA and that Claimant should not be at work at that time as aggressive physical therapy was preferred. EX 53 at 93.

On December 31, 1999, Claimant expressed to Dr. Dodson that he would like to return to light duty work because he was more mobile and had experienced a good improvement with physical therapy. Dr. Dodson found Claimant was moving much easier than he had in the past but that Claimant still had moderate spasm and tenderness to palpation of the back with a moderately improved range of motion. EX 54 at 94. Dr. Dodson also observed that Claimant's back problems had significantly worsened after his October 1999 MVA but that he was getting back near baseline. He released Claimant for light duty with a follow-up examination in two weeks. *Id.*

On January 14, 2000, Claimant expressed to Dr. Dodson that he had been hoping to be released to work an increased number of hours, but had changed his mind due to a rough work day he had two days prior to the visit and due to a discussion of his situation with his physical therapist. Dr. Dodson kept Claimant on a lifting restriction, with a 4-hour per day work hour restriction. EX 55 at 95.

On February 4, 2000, Dr. Dodson released Claimant back to full-time work, but kept the lifting restriction. On this visit, Dr. Dodson focused on Claimant's complaints regarding his shoulder pain, but noted that Claimant's neck was improving and was near baseline. EX 56 at 95.

On February 18, 2000, Claimant filed a formal claim for disability benefits for the March 1999 injury, stating that the nature of the injury was a ruptured lumbar disc. EX 57 at 97.

On March 10, 2000, Dr. Dodson continued to opine that the October 1999 MVA had significantly worsened his low back, but also commented that there were no significant changes in his neck or low back at that time. EX 58 at 98.

On March 16, 2000, Carrier/Employer controverted Claimant's claim for disability benefits, stating that Claimant had been released to full duty work as of April 2, 1999, and that his subsequent disability was due to the October 1999 MVA. EX 59 at 99.

Also on March 16, 2000, Dr. Englander compared Claimant's 1997[5] MRI with the 1999 MRI, and concluded that they both showed significant degenerative disease at L3-4 and L4-5 and that they were "roughly similar" in the lumbar area. Dr. Englander further opined that it was difficult for him to tell if Claimant had more central bulge or herniation in 1999 than he did in 1997. Dr. Englander continued to recommend conservative treatment for Claimant regarding the lumbar degenerative changes, and recommended a back brace, spine stabilization, and strengthening for the abdomen and lumbar area. Dr. Englander opined that there was no evidence of radiculopathy in Claimant's cervical or lumbar regions and no neurologic deficit. CX 12 at 36; EX 60 at 100. Dr. Englander also advised Claimant that the only alternative would be a surgical procedure consisting of a L3-4 and L4-5 fusion, but opined that surgery could accelerate changes at L2-3 and S-1 levels, which looked good at the time. *Id*.

On May 15, 2000, Dr. Dodson examined Claimant, who reported continued sleeping discomfort, pain in right shoulder with ambulation, and persistent headaches. EX 61 at 101. Dr. Dodson examined Claimant's neck and found bilateral spasms in the trapezius, rhomboid, and cervical muscles, which were more tender with palpable spasm on the right. *Id*. Dr. Dodson also found no atrophy about these muscles and no vertebral column tenderness, but found that Claimant's neck had restricted range of motion. *Id.* He further found tenderness in Claimant's shoulder, especially over the anterior joint, but he found no atrophy about the shoulder, erythema, or swelling. Dr. Dodson also found Claimant to have moderately limited range of motion with internal and external rotation. Claimant could only reach with his right arm to the low lumbar spine while being able to get up to the mid-thoracic spine with his left arm, and abduction was limited to about 120 degrees. *Id*. Dr. Dodson opined that Claimant had a new right shoulder injury since the MVA that had exacerbated his pre-existing neck condition, which at that time was still not at the level it was at prior to the MVA. *Id.*

On October 23, 2000, Dr. Dodson examined Claimant's right shoulder only, as Claimant reported continued right shoulder pain. EX 62 at 103. Dr. Dodson reported that Claimant continued to work because "he has to as he has no other source of income." *Id*. Dr. Dodson opined that Claimant's right shoulder rotator cuff tendinitus with evidence of impingement was

[5] While Dr. Englander references a 1995 lumbar MRI in the body of this medical report, he also states that out of the five MRIs, three were of Claimant's cervical spine, one in 1995 and two in 1999, and two were of Claimant's lumbar spine, one in 1997 and one in 1999. For purposes of this decision, I find that Dr. Englander's March 16, 2000 medical report mistakenly refers to a 1995 lumbar MRI when it should have stated that it was the 1997 lumbar MRI. This is also consistent with the record.

due to the MVA and that Claimant's continued chronic neck, upper back, and low back pain was confusing the status of Claimant's right shoulder injury. *Id.*

On November 16, 2000, Dr. Dodson assessed Claimant's low back condition and its relation to the March 1999 injury. Claimant's other two visits prior to this date, on May 15, 2000 and October 23, 2000, had been focused on Claimant's neck and shoulder pain. Claimant told Dr. Dodson during this visit that he had "a lot" of low back pain, could not walk normally, and had referred symptoms down into the right leg. Dr. Dodson reviewed the situation regarding Claimant's low back condition prior to the October 1999 MVA. Dr. Dodson had requested the 1999 MRI due to Claimant's increasing low back pain on October 4, 1999.

The 1999 MRI showed mild acquired spinal stenosis at L3-4 and moderate spinal stenosis for L4-5. EX 48 at 87; EX 63 at 105-106. There was some bulging or herniation of the disc but no ruptured disc at that time. *Id.* Dr. Dodson commented that he had no new recommendations or suggestions on the March 1999 injury. Dr. Dodson deferred undergoing a complete assessment on Claimant's low back condition after his October 1999 MVA because Claimant had an upcoming independent medical examination scheduled. Dr. Dodson also acknowledged that he was not the treating physician overall for this case and wanted to wait until he could further review Dr. Englander's notes as well. EX 63 at 105-106. Finally, Dr. Dodson mentioned how Claimant's lawyer talked to him and "helped straighten out these various issues [concerning Claimant's low back moderate spinal stenosis versus acquired acute trauma] in this case." EX 63 at 106.

4. Claimant's Current Low Back Condition

On November 28, 2000, Claimant was examined by independent medical examiners, Dr. R. Glenn Snodgrass, M.D., neurologist, and Stephen Fuller, M.D., orthopedic surgeon. EX 77. Employer/Carrier referred Claimant to both doctors for the medical examination. Dr. Snodgrass and Dr. Fuller reviewed the radiologists' reports and Claimant's medical history and gave the following opinions in response to Employer's questions. They opined that Claimant had recovered from the March 1999 injury by the spring of 1999, and that the influence of that injury had ended prior to the October 1999 MVA. Their opinion was that the contributing causes of Claimant's low back complaints after April 2, 1999, the date Claimant's March 1999 injury had allegedly resolved itself, were the progression of Claimant's degenerative disc disease. Finally, Dr. Fuller and Dr. Snodgrass concluded that any work restrictions placed on Claimant were due to the October 1999 MVA and Claimant's pre-existing degenerative changes in the lower back, and that no necessary restrictions were due to the March 1999 injury. The doctors recommended conservative treatment for any additional required treatment attributed to the October 1999 MVA. EX 64 at 107-114.

On February 1, 2001, Dr. Dodson conducted a follow-up exam to assess Claimant's low back pain after Claimant's independent medical examination. Dr. Dodson stated that he agreed with the independent medical examiners that most of Claimant's back pain was from the October 1999 MVA because Claimant was having somewhat increased back pain prior to the accident, but had a significant increase in his symptoms following the October 1999 MVA. EX 65 at 116-17. Dr. Dodson observed that his low back symptoms also waxed and waned, with some pain

into the buttocks. *Id*. Dr. Dodson opined that Claimant was in no acute distress at the time of the exam but had marked, continued limitation of motion and marked tenderness in the low back. Finally, Dr. Dodson concluded that there was nothing more that he could do for Claimant and that Claimant could consider local injections for pain relief. EX 65 at 116.

On June 19, 2001, Claimant had a fourth lumbar MRI (ordered by Dr. Karasek)(the "2001 MRI"), which once again showed a herniation at L4-5 and a bulge at L3-4. CX 18 at 63. Dr. Jeffrey Bickel interpreted it, finding a large right paracentral herniation with very mild degenerative facet change noted at L4-5, which continued to account for mild to moderate central stenosis at that level. He also found a fairly prominent diffuse bulging with no focal herniation or visibly significant spinal stenosis at L1-2, L2-3, L3-4 or L5/S1. *Id*. Dr. Bickel recommended correlation with clinical findings.

On April 16, 2003, Claimant visited Dr. Dodson again, after having received several epidural steroid injections for his low back pain, last in October of 2001. Dr. Dodson noted that Claimant had an exacerbation of this low back pain secondary to the October 1999 MVA. Due to increasing low back pain, Dr. Dodson scheduled Claimant for more injections. EX 66 at 118.

On August 29, 2003, Dr. Dodson received Claimant's file regarding his low back problems from Dr. Bert. In a letter to Employer/Carrier and Claimant's attorneys, Dr. Dodson addressed the question of whether the March 1999 injury was the major contributing cause of Claimant's back condition. Dr. Dodson reviewed Claimant's medical history prior to and after the March 1999 injury. He stated that Dr. Bert had treated Claimant on December 22, 1997 and that the 1997 MRI taken following that visit showed large disc material at L4-5 and to a lesser degree at L3-4. Claimant was treated conservatively and was declared medically stationary by Dr. Bert on May 20, 1998. Dr. Dodson, however, diagnosed continued low back pain when he treated Claimant on September 21, 1998. The 1999 MRI, which was done on October 4, 1999, showed no changes from the 1997 MRI requested by Dr. Bert. In this letter, Dr. Dodson confirmed the existence of a pre-existing low back pain prior to Claimant's March 1999 injury, and stated that it would be difficult to give an opinion as to whether the March 1999 injury was a significant contributing factor to Claimant's ongoing back pain, based on the fact that he had an abnormal MRI and back problems going back to December 1997. Dr. Dodson was therefore unable to give a conclusive opinion on the condition of Claimant's low back between his visit with Claimant on September 21, 1998 and the March 1999 injury. EX 67 at 119 -120.

On October 3, 2003, Dr. Dodson had a visit with Claimant, which he described as a "counseling" session. During this visit, Claimant informed Dr. Dodson that his insurance company had denied the referral to receive the steroid injections from Dr. Karasek. Dr. Dodson indicated that Claimant expressed that he wanted to get his life back to normal. He noted that prior to the March 1999 injury, Claimant was very active in his work and hobbies, but since the March 1999 injury, he has not been able to do these activities. Dr. Dodson then stated that he would like to change his previous opinion where he had stated that it was difficult to determine whether Claimant's current back condition was caused by his pre-existing low back injury of December 1997 or the March 1999.[6] Upon specifically discussing the situation with Claimant,

[6] There was no "injury" in 1997, though Claimant sought treatment from Dr. Bert at that time.

Dr. Dodson changed his earlier opinion and stated that the March 1999 injury was the contributing cause of Claimant's low back condition. EX 68 at 121-122.

On December 23, 2003, Dr. Dodson wrote another letter with his revised opinion to Employer/Carrier and Claimant's attorneys stating that the March 1999 injury was the "material significant contributing cause" to Claimant's ongoing low back problems. He also stated that Claimant's ongoing treatment should not only include physical therapy and X-rays, but also epidural steroid injections as recommended by his spine specialist, [Dr. Karasek].[7] EX 69 at 123.

On February 9, 2004, Dr. Dodson ordered a fifth MRI of Claimant's lumbar spine (the "2004 MRI"). For no apparent reason, Dr. Dodson compared this 2004 MRI with his examination of Claimant from October 4, 1999 including the earlier 1999 MRI. He assessed that the 2004 MRI showed severe central spinal stenosis at the L4-5 level secondary to a posterior right paramedian disc protrusion, and opined that these findings had progressed slightly since the comparison examination in October 1999. Dr. Dodson concluded that the 2004 MRI showed a progression of spinal stenosis, and that changes of chronic degenerative disc disease were present at the L4-5 level. Dr. Dodson, however, opined that there was only a small diffuse posterior disc bulge at the L3-4 level and that there was no evidence of significant spinal stenosis or extruded disc fragments. EX 70 at 124.

On March 1, 2004, Dr. Bert conducted a comprehensive examination of Claimant. He described Claimant's current pain as progressively severe, and observed that he could walk, but sitting, standing, bending, stooping and lifting would make his pain quite severe. Claimant described his pain as 8 out of 10. Claimant was taking numerous pain medications at this time. A review of his systems was normal. Claimant's spine examination showed that his range of motion was 30 for flexion, 20 for extension, and 10 for side bending with positive straight leg testing for both legs. EX 71 at 127. Tenderness was present over the lower lumbar spine in the midline. Dr. Bert reviewed an unidentified MRI which Claimant had brought with him and his impression was that Claimant had spinal stenosis secondary to large extruded L4-5 disc and L3-4 degeneration with bulging disk. EX 71 at 128. Dr. Bert's opinion was that this diagnosis was directly related to Claimant's on-the-job activity, which was "quite heavy," and that Claimant's condition was temporarily exacerbated by the October 1999 MVA. Dr. Bert recommended that Claimant seek treatment with epidural steroid injections. If this did not relieve his discomfort, Claimant would need decompression and fusion at L3-L5 if he was to continue his work activity. EX 71 at 127-28.

On June 24, 2004, Carrier/Employer stated that Claimant's claim for benefits arising out of the March 1999 injury was to remain controverted due to the independent medical examination stating that the March 1999 injury resolved and that Claimant's continued need for treatment was due to the October 1999 MVA. EX 72 at 129.

On February 8, 2005, Dr. Fuller conducted a second independent medical examination of Claimant, focusing on his low back condition. Dr. Fuller responded affirmatively that Claimant

[7] There are no medical opinions by Dr. Karasek contained in the exhibits submitted as evidence by either Claimant or Employer.

had recovered from the March 1999 injury. EX 76 at 167. This opinion was based on Dr. Fuller's findings that there were normal neurological exams, negative straight leg raising at the hands of three different physicians, no complaints or evidence of sciatica, and no radicular findings or symptoms. EX 76 at 167-70. Dr. Fuller stated that Claimant had sustained a lumbar sprain in March 1999, which had resolved gradually with chiropractic treatment from Chiropractor Rabin. *Id.* Dr. Fuller adopted Chiropractor Rabin's diagnosis that Claimant was medically stationary as of April 2, 1999. Dr. Fuller noted that a comparison between Dr. Bert's evaluation on May 20, 1998 showing a 45-degree lumbar flexion and the examination on April 2, 1999 showing a 50-degree lumbar flexion indicated that Claimant had returned to his baseline condition. EX 76 at 167.

Dr. Fuller also responded that Claimant had made a full recovery from the March 1999 injury prior to the October 1999 MVA, based on the fact that Claimant had returned to work for about six months prior to the October 1999 MVA. Dr. Fuller also referred to Dr. Englander's exam on July 27, 1999, in which Dr. Englander commented that Claimant was able to flex forward within about six inches off the floor although developing low back pain in the mid-line, and could do extension and lateral bending without pain. Dr. Fuller further opined that there could have been a "new and different episode" that provoked Claimant's chronic back pain. EX 76 at 167-68.

Dr. Fuller identified Claimant's pre-existing degenerative disc disease and spinal stenosis at L4-5 as the contributing causes of Claimant's back pain after April 2, 1999. Dr. Fuller adopted Dr. Bert's description of Claimant's low back condition in 1997 from when Dr. Bert had offered Claimant surgery, and used that description as the basis to support his opinion. EX 76 at 168.

Dr. Fuller commented that Claimant had complained to all his treating physicians that the October 1999 MVA had aggravated his spine condition and that he was off work for four months due to lumbar pain. He then commented that Claimant could not have any pain in his cervical spine area since he had two levels fused and held with a plate. EX 76 at 168.

Dr. Fuller responded that any work restrictions prior to the March 1999 injury were due to Claimant's cervical spine injury [from the 1992 ladder accident], and that he had no work restrictions pertaining to his low back condition prior to the March 1999 injury. Dr. Fuller opined that Claimant had no need for work restrictions related to the March 1999 injury since there was no objective pathology and Claimant had performed his regular job four weeks after that injury. Dr. Fuller attributed Claimant's increased work restrictions to the October 1999 MVA, which caused Claimant to need six months off work, increased physical therapy, and narcotic medications. EX 76 at 168-169.

In summary, Dr. Fuller disagreed with Claimant's physicians – Dr. Dodson and Dr. Bert – that Claimant's current back condition was attributable to the March 1999 injury for the following reasons: 1) Claimant had a pre-existing degenerative disc disease and severe pain prior to the March 1999 injury; 2) Claimant's symptom from the March 1999 injury was a lumbar muscle strain that resolved itself in four weeks, which is typical of a strain and not a structural disc injury; 3) Claimant had no evidence of discogenic injury on March 1, 1999; 4) the above-named physicians did not reference any of Chiropractor Rabin's or treating neurologist Dr.

Englander's medical records, which were also negative for a disk injury from the March 1999 incident; 5) the above-named physicians did not mention a new severe episode of lumbar back pain circa October 1, 1999 which was the precipitating reason that the October 4, 1999 MRI was performed; 6) the above-named physicians did not perform an analysis of the lumbar aggravation as a result of the October 1999 MVA; and 7) the above-named physicians did not provide any information regarding the natural history of degenerative disc disease, which was first shown in Claimant's 1989 X-rays and has followed a classical progression of degeneration entirely unaffected by the March 1999 injury. EX 76 at 169.

Dr. Fuller's ultimate conclusion was that there was no need for Claimant to undergo lumbar surgery at this time because there is no neurological deficit. He did concede, however, that his opinion could change if Claimant was to acquire a neurological deficit in the future. EX 76 at 170.

5. Deposition Testimony

On April 18, 2005, Dr. Bert gave his deposition testimony and further explicated his findings from the March 1, 2004 visit with Claimant. Dr. Bert stated that he was able to attribute the spinal stenosis and disc hernation directly to the March 1999 injury based on his objective findings, the MRIs, and the history given to him by Claimant. He explained the MRIs by stating that Claimant had acquired spinal stenosis and that he had ongoing disc herniation in his spine at L4-5 that would become progressively worse and did get worse between the 1997 MRI and the 1999 MRI. Dr. Bert further stated that he disagreed with Dr. Dodson's opinion regarding the 2004 MRI that there was no significant spinal stenosis at L3-4, and Dr. Bert determined that there was significant spinal stenosis at this level, in addition to at L4-5. Dr. Bert also opined that the 2004 MRI showed a sequential degeneration of Claimant's spine from the 1997 MRI and the 1999 MRI. CX 25 at 123-124. Dr. Bert also disagreed with treating neurologist physician, Dr. Englander, who opined that there was no significant change in Claimant's lumbar spine condition from the 1997 MRI to the 1999 MRI. CX 12 at 36; CX 25 at 124.

Dr. Bert further opined that spinal stenosis could be acquired from disc herniation or from degeneration and that in Claimant's situation, it was acquired from a combination of injury and degeneration. Dr. Bert's assessment was that Claimant's spinal health had continued to deteriorate from the time he treated him in 1997-1998 to 2004, and that he would have liked to take Claimant off work or place him on light duty restrictions. Dr. Bert indicated that he recommended surgery to Claimant during the March 1, 2004 visit if Claimant could "no longer live with [the pain]." When questioned as to which injury constituted the "most significant aggravation" to Claimant's disability, Dr. Bert responded with a reasonable medical certainty that the March 1999 injury was the most significant factor, because although the October 1999 MVA contributed to his back pain, Claimant's back returned to his prior level before the October 1999 MVA in about three months. Dr. Bert concluded that Claimant's back condition would not have worsened to the degree it did if he had not been working his current job with Employer. CX 25 at 124-128.

Dr. Bert testified that he first examined Claimant in 1995 for neck discomfort. CX 25 at 133. At that time, Claimant gave no indication of any complaints attributable to his lumbar spine.

Id. Dr. Bert next saw Claimant on December 22, 1997 for hip and leg pain. CX 25 at 134. At that time, Dr. Bert had no knowledge of any earlier injury to Claimant's low back. *Id*. Thereafter, Dr. Bert continued to see Claimant a few times from January 7, 1998 through May 20, 1998 for his low back problems. CX 25 at 135-40. Dr. Bert did not examine Claimant again until March 1, 2004. CX 25 at 141. When Dr. Bert opined about Claimant's low back condition in 2004, he had not viewed the 1999 MRI or the 2001 MRI. CX 25 at 146, 159. In addition, Dr. Bert has no record of ever seeing the 2nd 1999 MRI. CX 25 at 159. Dr. Bert's notes from March 1, 2004 were based on the February 9, 2004 MRI. *Id*.

CONCLUSIONS OF LAW

Credibility

The following conclusions of law are based on my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon the analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In arriving at a decision in this matter, I am entitled to determine the credibility of witnesses, to weigh the evidence, and to draw my own inferences from it; furthermore, I am not bound to accept the opinion or theory of any particular medical expert. *See Banks v. Chicago Grain Trimmers Assoc., Inc.,* 390 U.S. 459, 467, *reh'g denied,* 391 U.S. 929 (1968); *Todd v. Shipyards Corp. v. Donovan,* 300 F.2d 741, 742 (5th Cir. 1962); *Scott v. Tug Mate, Inc.,* 22 BRBS 164, 165 (1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988).

Claimant

Claimant presented himself as an honest man who has suffered a great deal of physical pain for the past sixteen years. He appeared to answer questions truthfully, to the best of his knowledge, and gave no reason to question his credibility.

Mrs. Leland (Claimant's Wife)

Claimant's wife, Mrs. Leland, also appeared to be honest and trustworthy, and gave no reason to doubt that she is a credible witness.

Dr. Dodson

Dr. Dodson was Claimant's family physician and not a neurologist, whose opinions concerning Claimant's back problems is relevant, if at all, only until they suddenly and completely changed in October 2003. Before that time, Dr. Dodson acknowledged his lack of expertise and deferred to the opinions of the treating neurologic physician, Dr. Englander, and the independent orthopedic surgeon, Dr. Stephen Fuller. Dr. Dodson is a family physician, not a spinal physician, and is not qualified to offer an informed opinion regarding the relationship of Claimant's low back condition to his March 1999 injury or to his employment. TR at 157. Moreover, Dr. Dodson favored Dr. Englander over himself as Claimant's true treating physician and deferred undertaking a complete assessment of Claimant's low back condition after his

October 1999 MVA because Claimant had an upcoming independent medical examination scheduled with Dr. Fuller. EX 63 at 105-106. Nonetheless, on February 1, 2001, Dr. Dodson conducted a follow-up exam to assess Claimant's low back pain after Claimant's independent medical examination with Dr. Fuller. Dr. Dodson stated that he agreed with Dr. Fuller that most of Claimant's back pain was from the October 1999 MVA because Claimant was having somewhat increased back pain prior to the accident, but had a significant increase in his symptoms following the October 1999 MVA. EX 65 at 116-17.

Moreover, on August 29, 2003, Dr. Dodson stated that he could not opine that the March 1999 injury was the major contributing cause of Claimant's back condition. Dr. Dodson reviewed Claimant's medical history prior to and after the March 1999 injury. He stated that Dr. Bert had treated Claimant on December 22, 1997 and that the 1997 MRI taken following that visit showed large disc material at L4-5 and to a lesser degree at L3-4. After examining Claimant in July 1999, Dr. Englander also had the 1999 MRI done on October 4, 1999 and *Dr. Dodson agreed with Dr. Englander that the 1999 MRI showed no changes from the 1997 MRI requested by Dr. Bert*. Dr. Dodson confirmed the existence of a pre-existing low back pain prior to Claimant's March 1999 injury, and opined that it would be difficult to give an opinion as to whether the March 1999 injury was a significant contributing factor to Claimant's ongoing back pain, based on the fact that he had an abnormal MRI and back problems going back to December 1997. EX 67 at 119 -120.

Furthermore, I note that in November 2000, Dr. Dodson mentions how Claimant's lawyer talked to him and "helped straighten out these various issues [concerning Claimant's low back moderate spinal stenosis versus acquired acute trauma] in this case." EX 63 at 106. I reject Dr. Dodson's complete reversal of opinion on October 3, 2003, when he had a visit with Claimant, which he described as a "counseling" session as it is not based on objective evidence but, rather, is based on Claimant's subjective comments. During this visit, Claimant informed Dr. Dodson that his insurance company had denied the referral to receive the steroid injections from Dr. Karasek. Dr. Dodson indicated that Claimant expressed that he wanted to get his life back to normal. Dr. Dodson then stated that he would like to change his previous opinion where he had assessed that it was difficult to determine whether Claimant's current back condition was caused by his pre-existing low back injury of December 1997 or the March 1999 injury. Based solely upon discussing the situation with Claimant, Dr. Dodson reversed himself and opined that the March 1999 injury was the contributing cause of Claimant's low back condition. EX 68 at 121-122.

I also reject Dr. Dodson's unexplained changed opinion contained in his December 23, 2003, letter repeating his changed opinion to Employer/Carrier and Claimant's attorneys stating that the March 1999 injury was the "material significant contributing cause" to Claimant's ongoing low back problems, and that Claimant's ongoing treatment should not only include physical therapy and X-rays, but also epidural steroid injections as recommended by his spine specialist, [Dr. Karasek]. EX 69 at 123.

Finally, on February 9, 2004, Dr. Dodson ordered the 2004 MRI of Claimant's lumbar spine. Dr. Dodson compared this 2004 MRI with the previous 1999 MRI taken on October 4, 1999. He assessed that the 2004 MRI showed severe central spinal stenosis at the level of L4-5

secondary to a posterior right paramedian disc protrusion, and opined that these findings had slightly progressed from the 1999 MRI. Dr. Dodson concluded that the 2004 MRI showed a progression of Claimant's spinal stenosis, and that changes of chronic degenerative disc disease were present at the level of L4-5. Dr. Dodson, however, opined that there was only a small diffuse posterior disc bulge at the level of L3-4 and that there was no evidence for significant spinal stenosis or extruded disc fragments. EX 70 at 124. This final opinion from Dr. Dodson is consistent with the opinion of Dr. Fuller that Claimant's low back condition in 2004 was the natural progression of his chronic degenerative disk disease. See EX 76 at 169.

Dr. Englander

Generally, the opinion of a claimant's treating physician is to be accorded greater weight than that of an independent medical examiner, since the physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." *See Amos v. Director, OWCP,* 153 F.3d 1051, 1054 (9th Cir. 1998), *amended by* 164 F.3d 480 (9th Cir.), *cert. denied sub nom. Sea-Land Service, Inc. v. Director, OWCP,* 528 U.S. 809 (1999); *Pietrunti v. Director, OWCP,* 119 F.3d 1035, 1043 (2nd Cir. 1997). I find that the lone treating physician whose opinions are deserving of great weight is Dr. Raymond N. Englander, a neurologist who examined Claimant during the relevant time periods of July 27, 1999 to March 16, 2000. CX 12 at 32-36.

On March 16, 2000, Dr. Englander compared Claimant's 1997 MRI with the 1999 MRI, and concluded that they both showed significant degenerative disease at L3-4 and L4-5 and that the lumbar area in the 1997 MRI and the 1999 MRIs were "roughly similar." CX 12 at 36; EX 60 at 100. Dr. Englander further opined that it was difficult for him to tell if Claimant had more central bulging or herniation in 1999 than he did in 1997[8]. Dr. Englander concludes by stating that Claimant "clearly does not have anything out where the [nerve] roots are in either film…." *Id*. Dr. Englander also opined that there was no evidence of radiculopathy in Claimant's cervical or lumbar regions and no neurologic deficit. *Id*. Dr. Englander continued to recommend conservative treatment for Claimant regarding the lumbar degenerative changes, and recommended a back brace, spine stabilization, and strengthening for the abdomen and lumbar area. Dr. Englander also advised Claimant that the only alternative would be a surgical procedure consisting of a L3-4 and L4-5 fusion, but opined that surgery could accelerate changes at L2-3 and S-1 levels, which looked good at the time. CX 12 at 36; EX 60 at 100.

I find that Dr. Englander's opinion that there was relatively little change, beyond minor degenerative changes, in Claimant's low back condition from the 1997 MRI to the 1999 MRI is entitled to great weight, particularly with respect to the issue of causation in this case.

Chiropractor Rabin

[8] Once again, while Dr. Englander references a 1995 lumbar MRI in the body of this medical report, he also states that out of the five MRIs, three were of Claimant's cervical spine, one in 1995 and two in 1999 and two were of Claimant's lumbar spine, one in 1997 and one in 1999. For purposes of this decision, I find that Dr. Englander's March 16, 2000 medical report mistakenly refers to a 1995 lumbar MRI when it should state that it was the 1997 lumbar MRI. This is also consistent with the record.

Under the Longshore Act, chiropractors are included in the definition of physician only to a limited degree that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation or dislocation shown by an x-ray or clinical findings. 20 CFR § 702.404. Chiropractor Rabin provided Claimant with reimbursable chiropractic services from March 5 to April 2, 1999 with respect to Claimant's temporary low back injury on March 1, 1999. See TR at 55; CX 10 at 24 and 28-29; EX 35 at 70-71; EX 36 at 72; EX 37 at 73; EX 40 at 77; EX 41 at 78; EX 44 at 81; and EX 45 at 82. I find Chiropractor Rabin to be Claimant's treating physician as to his work manipulating Claimant's spine. Moreover, I find Chiropractor Rabin's opinions persuasive because he was the main medical professional to treat Claimant for the first month after the March 1999 injury and he has provided a clear, logical record of that treatment. Moreover, Chiropractor Rabin's evaluations and opinions were respected and credited by the other physicians in this case, especially Dr. Fuller, who adopted Chiropractor Rabin's diagnosis that Claimant was medically stationary as of April 2, 1999 and could return to full-time work without ant restrictions. TR at 176-77; EX 76 at 167.

Dr. Fuller

Dr. Stephen Fuller, a board-certified orthopedic surgeon, examined Claimant on November 28, 2000 and a second time on February 8, 2005 as Employer's independent medical examiner. TR at 102; CX 17; CX 23; EX 64; and EX 76, EX 77. Dr. R. Glenn Snodgrass, a neurologist, and Dr. Fuller reviewed the radiologists' reports, reviewed Claimant's medical history, examined Claimant, and gave the following opinions in response to Employer's questions in November 2000. CX 17; EX 64. Unlike Dr. Bert, Dr. Fuller read and evaluated Claimant's entire medical record before opining on his condition. TR at 180. Also, Dr. Fuller had all four imaging studies available at the same time in addition to the reports from the radiologists. TR at 104.

Dr. Fuller opined that Claimant had recovered from the March 1999 injury by the spring of 1999, and that the influence of this injury had ended prior to the October 1999 MVA. Their opinion was that the contributing cause of Claimant's low back complaints after April 2, 1999, the date Claimant's March 1999 injury had resolved itself, was the progression of Claimant's degenerative disc disease. Finally, Dr. Fuller and Dr. Snodgrass concluded that any work restrictions placed on Claimant in 2000 would be due to the October 1999 MVA and Claimant's pre-existing degenerative changes in the lower back, and that no necessary restrictions were due to the March 1999 injury. The doctors recommended conservative treatment for any additional required treatment attributed to the October 1999 MVA, and not to the March 1999 injury. TR at 108-10, 129-30, 144; EX 64 at 107-114.

I find that these opinions are credible as they are consistent with the opinions referenced above from Dr. Englander, Chiropractor Rabin, and Dr. Dodson's opinions prior to October 2003. In addition, they are based on Claimant's full medical history, various examinations of Claimant and the objective medical evidence from tests administered by Drs. Dodson, Englander, Bert, Chiropractor Rabin, and Fuller/Snodgrass from 1997 through 2000 and the three lumbar MRIs from 1997 through 1999.

On February 8, 2005, Dr. Stephen Fuller conducted a second independent medical examination of Claimant, focusing on his low back condition. Dr. Fuller confirmed his earlier opinion that Claimant had recovered from the March 1999 injury. EX 76 at 167. This opinion was based on Dr. Fuller's findings that there were normal neurological exams, negative straight leg raising at the hands of three different physicians, no complaints or evidence of sciatica, and no radicular findings or symptoms. EX 76 at 167-70. Dr. Fuller stated that Claimant had sustained a lumbar sprain through the March 1999 injury, which had resolved gradually with chiropractic treatment from Chiropractor Rabin. *Id.* Dr. Fuller adopted Chiropractor Rabin's diagnosis that Claimant was medically stationary as of April 2, 1999. TR at 129-30. Dr. Fuller noted that a comparison between Dr. Bert's evaluation on May 20, 1998 showing a 45-degree lumbar flexion and the evaluation on April 2, 1999 showing a 50-degree lumbar flexion indicated that Claimant had returned to his baseline condition. TR at 144; EX 76 at 167.

Dr. Fuller also responded that Claimant had made a full recovery from the March 1999 injury prior to the October 1999 MVA, based on the fact that Claimant returned to full-time unrestricted work for about six months prior to the October 1999 MVA. TR at 129-30. Dr. Fuller also referred to Dr. Englander's exam on July 27, 1999 where Dr. Englander commented that Claimant was able to flex forward flex within about six inches off the floor although developing low back pain in the mid-line, and could do extension and lateral bending without pain. Dr. Fuller further opined that there could have been a "new and different episode" that provoked Claimant's chronic back pain. EX 76 at 167-68.

Dr. Fuller identified Claimant's pre-existing degenerative disc disease and spinal stenosis at L4-5 as the contributing causes of Claimant's back pain following April 2, 1999. TR at 108-110. Dr. Fuller adopted Dr. Bert's description of Claimant's low back condition in 1997 when Dr. Bert had offered Claimant surgery, and used that description as the basis to support his opinion. EX 76 at 168. Dr. Fuller further commented that Claimant had complained to all his treating physicians that the October 1999 MVA had aggravated his spine condition and that he was off work for four months due to lumbar pain. He then commented that Claimant could not have any pain in his cervical spine area since he had two levels fused and held with a plate. EX 76 at 168.

Dr. Fuller responded that any work-restrictions prior to the March 1999 injury were due to Claimant's cervical spine injury [from the 1992 ladder accident], and that he had no work restrictions pertaining to his low back condition prior to the March 1, 1999 injury. Dr. Fuller opined that Claimant had no need for work restrictions related to the March 1999 injury since there was no objective pathology and Claimant had performed his regular job four weeks after the injury. Dr. Fuller attributed Claimant's increased work restrictions to the October 1999 MVA which caused Claimant to need six months off work, increased physical therapy, and narcotic medications. TR at 111, 135; EX 76 at 168-169.

In summary, Dr. Fuller disagreed with Dr. Dodson (on or after October 2003) and Dr. Bert -- that Claimant's current back condition was attributable to the March 1999 injury for the following reasons: 1) Claimant had a pre-existing degenerative disc disease and severe pain prior to the March 1999 injury; 2) Claimant's symptom from the March 1999 injury was a lumbar muscle strain that resolved itself in four weeks, which is typical of a strain and not a structural

disc injury; 3) Claimant had no evidence of discogenic injury on March 1, 1999; 4) the above-named physicians did not reference any of Chiropractor Rabin's records or Dr. Englander's records which are also negative for a changed low back condition caused by the March 1, 1999 injury; 5) Claimant's above-named physicians did not mention a new severe episode of lumbar back pain circa October 1, 1999, which was the precipitating reason that the 1999 MRI was performed on October 4, 1999; 6) Claimant's above-named physicians did not perform an analysis of the lumbar aggravation as a result of the October 1999 MVA; and 7) Claimant's above-named physicians did not provide any information regarding the natural history of degenerative disc disease, which was first shown in Claimant's 1989 X-rays and has followed a classical progression of degeneration entirely unaffected by the March 1999 injury. TR at 108-11, 129-30, 135, 144; EX 76 at 169; *see also* CX 12 at 36; EX 60 at 100.

Dr. Fuller opined that Claimant completely recovered from his March 1999 injury, and employment activities made no contribution to Claimant's stenosis, bulges, or herniations. TR at 108-11, 129-30, 135, 141, 144, 181, and 184. As a result, I find Dr. Fuller's opinions consistent with treating physician Englander's opinions and quite credible.

Dr. Fuller's ultimate conclusion was that there was no need for Claimant to undergo lumbar surgery at this time because there is no neurological deficit. He did concede, however, that his opinion could change if Claimant were to acquire a neurological deficit in the future. EX 76 at 170.

Dr. Bert

The parties submitted a videotape of Dr. Bert's deposition as well as a corresponding written transcript. *See* CX 28. Dr. Bert was shown on the videotape sitting with Claimant's file containing Claimant's medical records and his examination notes. Dr. Bert appeared flustered during cross-examination when he was called upon to recall specific dates and records. *Id*.

After examining Claimant and reviewing the 1997 MRI in December 1997, Dr. Bert was of the opinion that surgery at Claimant's L4-5 was a reasonable option for Claimant due to his pain complaints, his medical history from 1995-1997, the 1997 MRI and objective test results showing sciatica from Claimant's disk herniation and a positive Spurling sign with a straight leg raising that bothered Claimant at 60 (degrees). CX 25 at 136-41. Dr. Bert also testified that he would have performed the same type of surgery (discetomy and fusion) in 1998 as he recommended in 2004 for Claimant's L4-5 problem. *Id*. Because Dr. Bert was prescribing the same spinal surgery for Claimant in 1998 as in 2004, I reject his opinion that the March 1999 injury caused Claimant his aggravated low back condition in 2004.

Dr. Bert evaluated Claimant in June 1995 (EX 13 at 24-25), January 1998 (CX 25 at 138-40; CX 7 at 12); April 1998 (CX 7 at 13); and May 1998 (CX 7 at 14). *Dr. Bert did not see Claimant again until March 1, 2004.* CX 25 at 121; EX 71 at 127-28. Also, Dr. Bert did not know when Claimant first experienced low back pain and based his May 2004 opinions primarily on Claimant's own subjective history of his low back problems. CX 25 at 170-71. Thus, since Dr. Bert did not evaluate or treat Claimant until 5 years after the March 1999 injury, he is not qualified to be Claimant's treating physician without full knowledge of Claimant's low back

problems including histories, examinations, and objective test results. Also, Dr. Bert should not be considered the treating physician for the March 1999 injury and his opinions about that injury should be given little weight because they are cursory and based on incomplete information as to Claimant's medical history. Moreover, Dr. Bert ignored relevant objective evidence such as the 1997 MRI which Dr. Bert previously interpreted as showing a large disk herniation at L4-5 and the opinion that it was reasonable, in 1998, that Claimant should undergo the same disk fusion surgery that Dr. Bert recommended in 2004. CX 25 at 137; CX 21 at 79. Rather, Dr. Englander is the true treating physician for this case because he was the first treating specialist to examine and treat Claimant after the March 1999 injury.

Claimant's 1997 MRI showed mild circumferential disc bulging at L3-4 level and a moderately central disc protrusion at L4-5 level. No other abnormalities were present. CX 6 at 11; EX 24 at 54. In January, 1998, Dr. Bert interpreted this same 1997 MRI opining that it "shows *a large disc herniation at L4-5* and to a lesser degree at [L]3-4." EX 25 at 55. (Emphasis added.) Dr. Bert's March 2004 notes reference the 1999 MRI as also showing a large extruded L4-5 disk with disk space narrowing at L4-5 and a bulging disk at L3-4. CX 25 at 146. Dr. Bert admitted that in March 2004, it was possible that he had forgotten about the earlier 1997 MRI when he reviewed the 1999 MRI that Claimant brought with him to form the basis for his conclusions about the March 1999 injury and Claimant's alleged aggravated low back condition. CX 25 at 146-47. In fact, Dr. Bert later admitted that the last time he had seen the 1997 MRI was in 1998 and not 2004. CX 25 at 158.

As a result, I do not find Dr. Bert's opinions regarding Claimant's low back condition credible as he does not explain how the March 1999 injury was solely responsible for his current low back condition when his own interpretations for the 1997 MRI and 1999 MRI do not appear notably different and Dr. Bert recommended the same fusion surgery as reasonable for Claimant in 1998 and again in 2004. In addition, Dr. Bert improperly relied on Claimant's untrained opinion that the low back problem from the MVA resolved yet Claimant's low back condition from the March 1999 injury did not despite Claimant's return to full-time unrestricted work within approximately one month after the March 1999 injury while Claimant missed approximately four months of work after the MVA.

In addition, Dr. Bert first learned of Claimant's March 1999 injury from Claimant when he met with Claimant in March 2004 and did not know Claimant's treating physician for that injury or details about treatment or how much time Claimant lost from work with the injury. CX 25 at 127, 152-53. Second, when giving his opinion in 2004, Dr. Bert relied almost entirely on Claimant subjective history for his health from 1998 through March 2004 and Dr. Bert was completely unaware of what attending and consulting physicians reported after the March 1999 injury and after the subsequent MVA. Dr. Bert did not know how long Claimant was off work after the March 1999 injury and he did not know if Claimant had low back pain between July 1, 1999 and October 8, 1999. CX 25 at 127, 153, and 156. Dr. Bert was also unaware of Claimant's earlier low back injuries and associated pain complaints in 1989 and 1992 prior to his examination of Claimant in December 1997 even though Dr. Crocker's 1989 note says that Claimant's low back pain started in January 1989 when Claimant twisted wrong getting out of bed. CX 25 at 134, 170; *see also* CX 1 at 1-2; EX 1 at 1; EX 6 at 6-7. Dr. Bert was not aware of Claimant's specific job tasks from 1999 to 2004 only general information that Claimant

occasionally lifted things weighing 25 to 50 pounds, and bent and stooped frequently. CX 25 at 128.

Furthermore, Dr. Bert only considered one, unidentified MRI that Claimant brought with him[9], even though at least four had been taken by that time (the 1997 MRI, the 1999 MRI, the 2nd 1999 MRI, and the 2001 MRI). At his deposition, Dr. Bert only referenced the 1997 MRI, the 1999 MRI, and the 2004 MRI ignoring the relevance of the 2nd 1999 MRI and the 2001 MRI. *See* CX 25 at 124-25. Even the MRIs that Dr. Bert did review show only insignificant changes to Claimant's L4-5 spine, which fail to support the opinions given by Dr. Bert that the March 1999 injury materially contributed to Claimant's ongoing low back problems and that Claimant's ongoing work has significantly worsened his condition. CX 25 at 127-28.

Dr. Bert testified that from 80% to 90% of the conclusions that a physician draws as to causation for spine problems is based on a patient's interpretation of the source of his discomfort. CX 25 at 144-45. Moreover, Dr. Bert had no knowledge of the severity or mechanism of Claimant's 1999 MVA or that Claimant was struck head on at 30 miles per hour but he did know from Claimant that the MVA caused him low back pain as the main consequence. CX 25 at 152-53, 155. As a result, Dr. Bert did not know how the March 1999 injury compared to the 1999 MVA other than Claimant telling him that his injuries from the MVA resolved at some point. I find Dr. Bert's opinions conclusory and based on inappropriate subjective statements from Claimant as a non-physician rather than based on objective medical evidence such as the various MRIs or opinions from Dr. Englander, Dr. Dodson (before October 2003), Dr. Fuller, or Chiropractor Rabin. Dr. Bert was uninformed about the opinions of Claimant's treating physicians from 1999 – August 2003 and their medical records.

If any of Dr. Bert's records or opinions should be credited, it is his records from treating Claimant from 1995 through 1998, because those were prepared before the prospect of litigation. Dr. Bert did not record in his notes or records that he ever reviewed the 1999 MRI. CX 25 at 135, 146-47, 157-58. At no time did Dr. Bert compare the 1997 MRI or the 1999 MRI to the 2004 MRI or the 1997 MRI to the 1999 MRI. Without such comparisons and without knowledge of Claimant's full medical history prior to 2004, Dr. Bert's opinions concerning the cause of Claimant's low back condition are unreliable and rejected.

1. Causation

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury." 33 U.S.C. § 902(2); *Gardner v. Bath Iron Works Corp.,* 11 BRBS 556 (1979), *aff'd sub nom., Gardner v. Director, OWCP,* 640 F.2d 1385 (1st Cir. 1979). The term "injury" also encompasses the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work related conditions. *Lopez v. Southern Stevedores,* 23 BRBS 295 (1990); *Care v. WMATA,* 21 BRBS 248 (1988). An employment-related injury need not be the sole cause or primary factor in a disability for compensation purposes, but if such injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is

[9] Presumably it was the 2004 MRI but there is no evidence which specific MRI was reviewed.

compensable. *Strachan Shipping v. Nash,* 782 F.2d 513 (5th Cir. 1986); *Independent Stevedore Co. v. O'Leary,* 357 F.2d 812 (9th Cir. 1966); *Kooley v. Marine Industries Northwest,* 22 BRBS 142 (1989).

Pursuant to section 20 of the Act, a claimant's condition is presumed to be causally related to the claimant's employment in the absence of substantial evidence to the contrary. 33 U.S.C. § 920(a); *Ramey v. Stevedoring Services of America,* 134 F.3d 954, 959 (9th Cir. 1998). To invoke the presumption, the "claimant need only show that [he] sustained physical harm and that conditions existed at work which could have caused the harm." *Id.* (quoting *Susoeff v. San Francisco Stevedoring Co.,* 19 BRBS 149, 151 (1986)). Once invoked, the burden of proof shifts to employer to rebut the presumption with substantial countervailing evidence. *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140, 144 (1991). If employer rebuts the presumption, the presumption no longer controls and the administrative law judge must evaluate the record as a whole to determine the issue of causation. *Parsons Corp. v. Director, OWCP (Gunter)*, 619 F.2d 38 (9th Cir. 1980); *Brown v. Pacific Dry Dock,* 22 BRBS 284 (1989).

a. Prima Facie Case

To establish a *prima facie* case under the Act, a claimant must show that he or she sustained physical harm and that conditions existed at work which could have caused the harm. *Ramey v. Stevedoring Services of America,* 134 F.3d 954, 959 (9th Cir. 1998). A claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for *prima facie* case and to invoke the section 20(a) presumption. *See Sylvester v. Bethlehem Steel Corp.,* 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Director, OWCP,* 681 F.2d 359 (5th Cir. 1982). A claimant also need not affirmatively establish a connection between work and harm. *Kier v. Bethlehem Steel Corp.,* 16 BRBS 128, 129 (1984).

Claimant alleges that the March 1, 1999 injury and/or his continuing work for Employer are the causes of his current low back condition. Dr. Bert opined that Claimant's spinal stenosis and L4-5 disk and L3-4 degeneration was "directly related to his on the job activity, which is quite heavy, and his on-the-job injury on March 1, 1999" and that the October 1999 MVA only temporarily exacerbated his condition. EX 71 at 128. CX 12 at 35. Similarly, Dr. Dodson concluded that the March 1999 injury was a significant contributing factor to Claimant's ongoing low back problems and the MVA was merely an exacerbation. CX 19 at 74. While I reject these medical opinions for the reasons stated in my preceding credibility discussion, Claimant himself, nonetheless testified that his job with Employer is strenuous, and that he requires help from his coworkers due to increased pain on a daily basis since the March 1999 injury. TR at 49. These opinions and testimony constitute evidence that Claimant's current condition is caused by the March 1999 injury or his ongoing work.

Based on the foregoing, I find that Claimant has established a *prima facie* case with respect to his low back condition.

b. Employer's Rebuttal

Once the *prima facie* case is met, the employer bears the burden of rebutting the presumption with substantial countervailing evidence that the claimant's condition was not caused or aggravated by his or her employment. *Cairns v. Matson Terminals,Inc.*, 21 BRBS 252 (1988). Such evidence includes a physician's unequivocal statement, to a reasonable degree of medical certainty, that the claimant's injury is not related to his or her employment. *O'Kelley v. Dep't of Army/NAF,* 34 BRBS 39, 41-42 (2000). However, where aggravation of a pre-existing condition is at issue, an employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *See, e.g., Cairns v. Matson Terminals*, 21 BRBS 252 (1988). An employer can also rebut the presumption with evidence that the claimant's condition was due to a subsequent intervening cause, which was not work-related and was not the natural or unavoidable result of the work injury. *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954); *Wright v. Connolly-Pacific Co.*, 25 BRBS 1616 (1991).

Dr. Fuller testified that Claimant completely recovered from the March 1999 injury by April 2, 1999, and that Claimant's work activities did not aggravate his pre-existing conditions. TR at 144. Rather, Dr. Fuller opined that Claimant's current low back condition was due to the progression of his degenerative disc disease and the October 1999 MVA. EX 64 at 107-114. Similarly, when he first evaluated Claimant in July 1999, Dr. Englander found that Claimant's pre-existing degenerative disc disease and herniation at L4-5 had become more symptomatic. CX 12 at 34; EX 46 at 85. In 2000, upon comparing Claimant's 1997 MRI and the 1999 MRI, Dr. Englander found that they were similar with no notable differences and that both showed significant degenerative disc disease. CX 12 at 36; EX 60 at 100. These opinions constitute evidence that Claimant's pre-existing conditions, and not the March 1999 injury, caused his current low back condition.

Based on the foregoing, Employer has presented substantial evidence to rebut the presumption.

c. Weighing the Evidence Regarding Causation

Once the employer rebuts the section 20(a) presumption, the presumption no longer controls and the administrative law judge must weigh the evidence in the record to determine the issue of causation. *Parsons Corp. v. Director, OWCP (Gunter)*, 619 F.2d 38 (9th Cir. 1980); *Brown v. Pacific Dry Dock,* 22 BRBS 284 (1989).

Claimant asserts that the March 1999 injury caused his current back condition, and even if the MVA exacerbated his low back, there is substantial evidence that his subsequent work for Employer has aggravated or accelerated his condition. ALJX 7 at 2. In contrast, Employer argues, per the opinion of Dr. Fuller, that Claimant's current low back condition bears no causal relationship to his injury of March 1, 1999 or to his subsequent employment. TR at 144.

Weighing all of the evidence, I find that Claimant's current condition is caused by progression of his pre-existing conditions and by the October 1999 MVA, for the reasons discussed below.

i. Pre-existing conditions vs. March 1999 injury

Claimant's pre-existing low back condition is long established. He has experienced low back pain since January 1989 when he twisted his back getting out of bed. CX 1 at 1. X-rays taken at that time showed degenerative disc disease and disc space narrowing at L4-5. CX 1 at 2. Claimant sought treatment for low back complaints, from Dr. Bert, as early as December 1997. CX 5 at 10; EX 23 at 53. The existence of a low back condition was confirmed by the 1997 MRI, which showed mild circumferential disc bulging at L3-4 level, moderate central disc protrusion at L4-5 level, and no other abnormalities. CX 6 at 11; EX 24 at 54. Claimant continued to have low back pain through September 1998, when he was first treated by Dr. Dodson. CX 8 at 15.

It is undisputed that Claimant was injured at work on March 1, 1999. However, the parties dispute whether Claimant fully recovered from the March 1999 injury or whether is a contributing cause of his current low back condition.

In the weeks after the March 1999 injury, Claimant was treated by Chiropractor Rabin. EX 35; EX 36; EX 37. On April 2, 1999, Chiropractor Rabin released Claimant from treatment and authorized him to return to full-duty work with no restrictions, because of a lack of permanent impairment. CX 10 at 30. I find Chiropractor Rabin's opinion persuasive because he was the main medical professional to treat Claimant for the first month after the March 1999 injury and he has provided a clear, logical record of that treatment. Moreover, the conclusion that Claimant had reached permanent status with regard to the March 1999 injury is supported by the fact that Claimant returned to full-duty work on or before April 2, 1999, and his low back continued to do reasonably well while working. CX 10 at 30; EX 45 at 82. Finally, Drs. Fuller and Snodgrass, who I find credible, later concurred in their IME report of November 28, 2000 that Claimant had reached a point of maximum medical improvement with regard to his work injury as of April 2, 1999. EX 64 at 107-114. Dr. Fuller testified that he believed Claimant had suffered a lumbar strain due to the March 1999 injury, from which he recovered by April 1999, because Claimant had returned to full-duty work and because Chiropractor Rabin found good range of motion and neurological signs, with no indication of disc herniation caused by the March 1999 accident. TR at 129-30.

The objective evidence also supports the conclusion that Claimant does not have any permanent impairment from the March1999 injury. When Dr. Englander evaluated Claimant in July 1999 he found that the 1997 MRI indicated a moderately large disc herniation at L4-5 which had become more symptomatic. CX 12 at 34; EX 46 at 85. Later, when he compared the 1997 MRI with the 1999 MRI (dated October 4, 1999), Dr. Englander believed that the 1999 MRI showed little change from 1997 to 1999. Specifically, he opined that the lumbar area was "roughly similar" and they both showed degenerative disc disease at L3-4 and L4-5. He also opined that it was difficult to tell if Claimant had more central bulging or herniation in 1999 than in 1997. CX 12 at 36; CX 60 at 100. This lack of any objective change supports a finding that that Claimant had recovered from March 1999 injury by April 2, 1999, and any remaining disability was due to preexisting condition.

Claimant disputes the conclusion that by April 2, 1999 he had recovered from the March 1999 injury, asserting that he continued to suffer low back pain for approximately five months following his March 1999 injury. TR at 55-56. I do find Claimant credible with regard to his pain, but not with regard to the cause of his pain since he has no medical training or other persuasive basis for such a conclusion. Given that Claimant had been experiencing low back pain for years prior to the March 1999 injury and had sought treatment for it as recently as September 1998, there is no reason to assume that any back pain he was experiencing after April 1999 was due to the March 1999 injury rather than his pre-existing condition.

Claimant also argues that the fact that he sought treatment from Dr. Englander and Dr. Dodson between April 1999 and the October 1999 MVA is evidence that he had not recovered from the March 1999 injury. However, the visit to Dr. Englander in late July 1999 was primarily for his neck and arm complaints (TR at 76-78), and the visit to Dr. Dodson in early October 1999 was just to get an update on his low back condition. (EX 47 at 86). Moreover, Claimant did not return to Chiropractor Rabin for further low back treatment, even though the chiropractic treatments had been successful in helping Claimant to move and walk again after the March 1999 injury. I find that the timing and reasons for which Claimant sought medical treatment between April 1999 and the October 1999 MVA provide further support for the conclusion that any low back problems he was experiencing during that time were due to his pre-existing condition.

Claimant also relies on the opinion of Dr. Bert that his current back condition is due to the March 1999 accident. CX 25. However, for the reasons discussed above under the credibility analysis, I do not find Dr. Bert's opinion to be persuasive. In particular, Dr. Bert's opinions regarding the March 1999 injury are not credible because he did not evaluate Claimant until exactly 5 years after that injury. EX 71 at 127-28. When Dr. Bert did evaluate Claimant and give his opinions in March 2004, he did not consider most of the relevant medical records, and even the MRIs he did review failed to show significant objective change that would support his conclusions that the March 1999 injury and Claimant's work caused his condition. In fact, Dr. Bert's own records from treating Claimant in 1995, 1997, and 1998, which are more credible since they were before the prospect of litigation, prove that Claimant had a significant low back condition before the March 1999 injury.

Claimant also attempts to rely on the opinion of Dr. Dodson that the March 1999 injury was the major contributing cause of Claimant's condition. However, as discussed above, his opinion should not be credited because it constitutes a complete change in position that was made only after communication from Claimant's attorney and an informal conversation with Claimant. If any opinion of Dr. Dodson should be credited, it his opinion on August 29, 2003 after evaluating Claimant and all of the records that "[i]t would be difficult to attribute the March 1, 1999 injury as the major contributing cause of his ongoing low back pain because he obviously had rather significant pain that caused him to see Dr. Bert in December, 1997 [and] there were significant abnormalities on his MRI at that time." 67 at 120. Thus, if it is given any weight, Dr. Dodson's opinion in August 2003 supports the conclusion that Claimant's ongoing low back problems are due to his pre-existing condition rather than the March 1999 injury.

Based on all of the above, I find that Claimant had fully recovered from the March 1999 injury with no permanent impairment by April 2, 1999. Therefore, any low back pain, problems, or treatment Claimant had between April 2, 1999 and the October 1999 MVA were solely due to his pre-existing low back condition.

ii. October 1999 MVA

It is undisputed that Claimant was involved in a non-work-related MVA on October 8, 1999. However, the parties dispute what effect the October 1999 MVA has had on Claimant's current low back condition. Claimant argues that that his ongoing low back problems were largely due to his strenuous work activity and his March 1999 work accident, and that the MVA was only a temporary exacerbation. In contrast, Employer argues that the October 1999 MVA contributed to, aggravated, or accelerated Claimant's pre-existing low back condition.

Claimant argues, per the opinion of Dr. Bert, that the March 1999 work injury was much more significant than the October 1999 MVA. Dr. Bert testified that while he continued to suffer pain for many months after the March 1999 injury, Claimant's back returned to its prior level within three months after the MVA. CX 25 at 124-28. However, the evidence shows that Claimant returned to full-duty work one month after the March 1999 injury, whereas he did not return to work for approximately three months after the October 1999 MVA and even then it was only light-duty, part-time work. EX 54; EX 55. Claimant also testified that it took three to four months for him to recover from the October 1999 MVA. TR at 79. Thus, the longer recovery period for the October 1999 MVA than the March 1999 work injury indicates that the MVA had a more significant effect on Claimant's low back condition.

In addition, Drs. Fuller and Snodgrass, in the IME report from November 28, 2000, concluded that Claimant's low back condition was due to his pre-existing degenerative disc disease, although the October 1999 MVA had also contributed to the low back pain. EX 64 at 107-14. According to Dr. Fuller, the 2nd 1999 MRI, which was taken after the October 1999 MVA, showed accelerated changes at L3-4, beyond the rate of normal progression. Dr. Dodson concurred with Dr. Fuller, stating that "the independent medical exam felt that most of the back pain was from the [October 1999 MVA] accident. That has been my opinion also. He was having increased back pain prior to the accident, but there was a significant increase in his symptoms following the MVA."

Thus, I find that the October 1999 MVA exacerbated Claimant's pre-existing low back condition and is the cause any changes or increased pain and symptoms beyond what is due to normal progression of his degenerative disc disease.

iii. Continuing Work

Claimant argues, in the alternative to his argument regarding the March 1999 injury, that his low back condition is caused by cumulative traumatic injuries from his continued work for Employer. Employer argues, based on the testimony of Dr. Fuller, that Claimant's work has not contributed to his pre-existing low back condition of degenerative disc disease with herniation at

L4-5, bulge at L3-4, and spinal stenosis. ALJX 8 at 7, 14. The applicable legal standard is that where an employment-related injury aggravates, combines with, or accelerates a pre-existing condition, the entire resultant condition is compensable. *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986); *Laplante v. General Dynamics Corp./Elec. Boat Div*., 15 BRBS 83 (1982).

Claimant argues that his ongoing work has aggravated his low back condition based on four things: 1) his need for restrictions and modifications in his work activities due to pain; 2) his increased pain during the work week; 3) his need for a greater amount of pain medication, and 4) Dr. Bert's opinion.

First, Claimant asserts that since he returned to work after the March 1999 injury, he has not been able to do his work in the way he used to. TR at 48. He now requires extra tools and equipment, including a hoist or jib crane for lifting, and he needs aid from his co-workers for certain tasks. TR at 48-49, 51, 74. However, Claimant concedes that some of the pain he experiences and some of the modifications he has needed to make in doing his work are due to problems with his knee and shoulder from the October 1999 MVA and neck from the 1992 ladder incident. TR at 59-60, 80. Claimant also wears a back brace every day, which he started wearing when he returned to work after the March 1999 injury, although he did not wear it every day at first. TR at 64. He experiences increased pain from sitting for lengthy periods of time, and needs to get up to stretch. TR at 68-69.

Second, Claimant testified that he has back pain every day that has been getting progressively worse. TR at 67-68. However, he testified that his pain is greater during the work week than on weekends. TR at 69, 96.

Third, Claimant also asserts that he had to take about 3-4 pain pills per week before the March 1999, and now he takes 3-4 per day, sometimes up to 6 per day. TR at 71, 90.

Fourth, when he examined an unidentified MRI that Claimant brought to his office and diagnosed spinal stenosis due to the L4-5 extruded disc and L3-4 bulging, Dr. Bert stated that "this is directly related to his on the job activity which is quite heavy and his on the job injury on March 1, 1999 temporarily exacerbated by the MVA." EX 71 at 128. As discussed above, this opinion should not be credited because it was based on wholly incomplete review of the MRIs and Claimant's other relevant medical history and a failure to consider even Dr. Bert's own treatment and evaluation of Claimant in 1997 and 1998.

In contrast, Employer argues that Claimant's ongoing work has not aggravated or contributed to his pre-existing low back condition based on six things: 1) there has been no objective change in Claimant's condition other than what is due to natural progression; 2) any increased pain or symptoms are due to natural progression and aging; 3) work does not harm his spine because other levels of his spine have not been damaged, especially the vulnerable L5-S1; 4) current research does not show that activity harms the spine; 5) Claimant's increased use of medication is due to a developed tolerance to the medication; and 6) the October 1999 MVA exacerbated Claimant's condition and is the cause of any increased symptoms or work restrictions.

First, Dr. Fuller testified that he does not believe Claimant's work has contributed in any way to his stenosis, degenerative disease, herniation, bulging, or to any of the changes observed in the MRIs. TR at 137, 144, 178. Rather, Dr. Fuller believes that Claimant's low back condition is caused by genetically mediated degenerative disc disease. TR at 123. Dr. Fuller emphasizes that although Claimant's symptoms may change, there has been no objective worsening beyond normal progression. TR at 156-59.

Second, while Dr. Fuller conceded that Claimant's work activities may cause him increased pain and symptoms in his low back, he believes that Claimant's increased pain is due to normal progression. TR at 141-42, 155-56, 171, 177. He explained that "he has normal progression and has mechanical symptoms. And it's a fact of life that as we age, we're less able to carry a hundred pound propeller….if he tries things now that he used to do ten years ago, he may bear the consequences and…he may be more symptomatic from the same activity." TR at 142.

Third, Dr. Fuller testified that there is no indication that his work activities have caused damage to his spine because the other levels, that do not have degenerative disc disease, have not been affected at all, especially the L5-S1 level that is usually particularly vulnerable to injury. TR at 123, 139, 160.

Fourth, according to Dr. Fuller, current research does not support the conclusion that heavy work increases trauma to the back. TR at 137-38. Dr. Fuller cited studies indicating that the effects of degenerative disc disease are determined by one's genetics rather than one's activities. TR at 138. He also cited other research indicating that physical activity and lifting strengthen the back and make for a sturdier spine, and opined that Claimant actually has less back pain due to his work because it strengthens his spinal muscles. TR at 139-41. He also testified that Claimant is going to have back pain regardless of whether he active and working or not. TR at 184.

Fifth, Dr. Fuller believes that Claimant's increased use of pain medication is due to a developed tolerance to the medication, not due to an aggravation of his condition, since "all of his physical objective criteria really have remained the same." TR at 142-43.

Finally, Dr. Fuller concluded the October 1999 MVA was a significant trauma, given that it required Claimant to miss months of work and to need narcotic medications and physical therapy. EX 74. Thus, he found that any increased work restrictions placed on Claimant were due to the October 1999 MVA and Claimant's pre-existing degenerative changes in the lower back. EX 64.

Weighing all of these arguments and the credible evidence, I find that Claimant's ongoing work has not aggravated, accelerated, or contributed to his low back condition.

I find that the objective evidence fails to show any worsening of Claimant's low back condition due to his work activities. The 2001 MRI, which was ordered by Dr. Karasek, showed a herniation at L4-5 and a bulge at L3-4. These findings were the same as the 1997 MRI, the 1999 MRI, and the 2nd 1999 MRI. Similarly, the 2004 MRI, which was ordered by Dr. Dodson,

showed severe central spinal stenosis at the L4-5 level due to a posterior right paramedian disc protrusion and a small diffuse posterior disc bulge at the L3-4 level. EX 70 at 124. Comparing these results to the 1999 MRI, Dr. Dodson found that there had been only a slight progression of Claimant's spinal stenosis and changes due to chronic degenerative disc disease. EX 70 at 124. Dr. Fuller, comparing all of the MRIs, assessed that there had only been changes due to natural progression. Thus, even though Claimant has been working from April 1999 until the October 1999 MVA and from January 2000 until the present, the only objective changes in his lumbar spine are the acceleration at L3-4 after the October 1999 MVA and normal progression of his pre-existing degenerative disc disease. This supports the conclusion that Claimant's work activities have not aggravated or accelerated his condition.

Thus, since there has been no aggravation of Claimant's condition based on objective evidence, Claimant's argument for aggravation could only be based on a worsening of his pain and other subjective symptoms. I find that Claimant is credible with regard to his pain and other symptoms, however, I find no reason to credit Claimant's statements about the cause of his pain. I find the testimony of Dr. Fuller credible, especially with regard to his opinion that Claimant's need for more pain medication is due to a developed tolerance to the medication. I also credit Dr. Fuller's opinion that Claimant's increased pain, symptoms, and need for work modifications are due to the natural progression of his pre-existing condition as he ages.

In addition, as discussed below, I find that the October 1999 MVA exacerbated Claimant's pre-existing condition. This conclusion is supported by the fact that when Claimant returned to full-duty work with no restrictions in April 1999, which was shortly after the March 1999 injury, Chiropractor Rabin noted that working in awkward positions was only causing him to have sore shoulders, but that his lower back was still doing reasonably well. CX 10 at 30; EX 45 at 82. Thus, the fact that Claimant has experienced an increased amount of pain, symptoms in other parts of his body, and more work limitations since he returned to work in January 2000 provides support for the conclusion that the October 1999 MVA exacerbated his condition. Thus, any increase in symptoms or need for work restrictions beyond natural progression are due to the effects of the injuries Claimant suffered from the October 1999 MVA.

For all of these reasons, I find that Claimant's ongoing work for Employer has not aggravated or accelerated his low back condition.

2. Intervening Cause

Employer contends that even if it is found liable for aggravation of Claimant's low back injury, Claimant's MVA was an intervening cause that worsened his low back condition, thereby severing any liability that Employer may have had. Claimant argues that although he returned to work several weeks after the March 1, 1999 injury, his condition never stabilized and he suffered continuing low back problems due to work even after the time of the MVA.

The law of intervening cause examines whether a claimant's disability is causally related to a work-related injury, or whether a subsequent, non-work-related injury constitutes an intervening cause that breaks the chain of causation between the work-related injury and the claimant's disability, thus interrupting the employer's liability. In this case, it is not necessary to

analyze whether the October 1999 MVA is an intervening cause breaking the chain of causation because I have found that that the Claimant's current condition is not causally related to his March 1999 work injury nor his continuing work activities as the March 1999 injury fully resolved by April 2, 1999. TR at 144. As discussed above, Claimant's current condition is primarily caused by the progression of his pre-existing low back condition of degenerative disc disease and spinal stenosis, and any objective changes, increased pain, symptoms, or restrictions beyond those which are caused by natural progression are attributable to the October 1999 MVA.

3. Nature and Extent of Disability

A disability is the "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or other employment." 33 U.S.C. § 902(10). Compensation for an industrial injury depends on the nature and extent of the disability, both of which must be established by the claimant. 33 U.S.C. § 908(c)(21); *Trask v. Lockheed Shipbuilding & Const. Co.,* 17 BRBS 56, 59 (1985). When evaluating a disability, I will consider the claimant's age, education, and employment history, as well as the availability of appropriate employment. *Amer. Mut. Ins. Co. v. Jones,* 426 F.2d 1263, 1265 (D.C. Cir. 1970).

a. Nature of Disability

A disability is permanent if the claimant has any residual impairment after reaching maximum medical improvement or if the disability has persisted for a lengthy period of time and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedores Corp.,* 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied,* 394 U.S. 976 (1969); *Trask,* 17 BRBS at 60.

The parties have stipulated that Claimant's period of temporary total disability was from March 5, 1999 through March 17, 1999, during which time Claimant received temporary total disability benefits from Employer. EX 38 at 74-75; EX 39 at 76; EX 43 at 80; TR at 13.

On April 2, 1999, Chiropractor Rabin opined that Claimant was medically stable and could be released from treatment due to a lack of permanent impairment. CX 10 at 30; EX 45 at 82. In his November 28, 2000 IME report, Dr. Fuller agreed that Claimant had recovered from the March 1999 injury by April 2, 1999. EX 64 at 107-14.

Also in April 1999, Claimant returned to work full-time without restrictions and continued working until his MVA in October 1999. Claimant did not seek any further chiropractic treatment from Chiropractor Rabin. TR at 55-56. Between April 1999 and the October 1999 MVA, Claimant was evaluated by Dr. Englander and had a follow-up visit with Dr. Dodson, mostly for the purposes of addressing his neck and arm problems and updating his low back condition; CX 12; EX 46; EX 47. However, neither of these doctors expressed that Claimant's March 1999 injury was permanent.

For all of the reasons discussed above under the causation analysis, I find that Claimant had fully recovered from the March 1999 injury as of April 2, 1999 and his pre-existing condition has not been aggravated by his ongoing work activities, and thus Claimant has no permanent work-related impairment.

b. Extent of Disability

Under the Act, a claimant is presumed to be totally disabled where he or she establishes an inability to return to his or her usual employment. *Manigault v. Stevens Shipping Co.,* 22 BRBS 332, 333 (1989); *Elliot v. C & P Tel. Co.,* 16 BRBS 89, 91 (1984). If the claimant invokes this presumption, the burden shifts to employer to establish the availability of suitable alternate employment that the claimant is capable of performing. *Bumble Bee Seafoods v. Director, OWCP,* 629 F.2d 1327 (9th Cir. 1980); *New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 1038 (5th Cir. 1981). To meet this burden, the employer must identify specific positions which are realistically available to the claimant and comport with the claimant's physical restrictions. *Hairston v. Todd Shipyards Corp.,* 849 F.2d 1194, 1196 (9th Cir. 1988); *Bumble Bee Seafoods,* 629 F.2d at 1330. Even if the employer succeeds at establishing suitable alternate employment, the claimant may still prevail by showing an inability to secure employment despite a diligent effort. *Palombo v. Director, OWCP,* 937 F.2d 70, 73 (2d Cir. 1991).

To invoke the presumption of total disability, Claimant need not establish that he cannot return to any employment, but need only show that he is unable to return to his former employment as a journeyman machinist. *Elliot,* 16 BRBS at 89; *Ramirex v. Vessel Jeanne Lou, Inc.,* 14 BRBS 689 (1982) ("usual employment" is the claimant's regular duties at the time of injury).

On March 16, 1999, Chiropractor Rabin informed Claimant that he could return to light duty work. CX 10 at 27; EX 41 at 78. On April 2, 1999, Chiropractor Rabin opined that Claimant was medically stable and released him to full duty work. EX 40 at 77; EX 44 at 81. At that point, Claimant returned to work full-time, until the October 1999 MVA. Claimant was unable to work for approximately 3 months after the October 1999 MVA, but he returned to work in January 2000, beginning with light-duty, part-time work and building up to full-duty, full-time work. EX 54; EX 55. Claimant has had a 25-pound lifting restriction since March of 2004. CX 25 at 130. Aside from this work restriction and some informal modifications in how he does his work, Claimant has been doing full-duty, full-time work since early 2000 and has even been doing overtime work. TR at 37. Thus, Claimant has no disability from an economic perspective.

However, even if Claimant was unable to perform his usual work, Employer would not be liable for his loss of earning capacity. Because I find that Claimant's current low back condition is not causally related to or aggravated by the March 1999 injury or his ongoing work activities, Claimant has no work-related disability for which Employer is liable.

c. De Minimis Award

Although Claimant did not raise the issue of a *de minimis* award, I have considered it, and found that the evidence does not support a finding. *De minimis* awards are appropriate where a claimant has not established a present loss in wage-earning capacity, but has shown by a preponderance of the evidence that there is a significant possibility of diminished capacity under future conditions. *See Metropolitan Stevedore Co., v. Rambo (Rambo II)*, 521 U.S. 121, 31 BRBS 54 (CRT) 1997. There are three conditions that must be satisfied before nominal compensation may be awarded: (1) a continuing disability, (2) no current loss of wage-earning capacity attributable to the subject injury, and (3) a reasonable expectation that the work-related injury will cause a loss in wage-earning capacity at some future point. *Id.* at 62. The medical evidence does not support a continuing work-related disability, because as discussed above, Claimant's current condition is due to progression of his pre-existing low back condition, which was exacerbated by the October 1999 MVA. No evidence was submitted to support a loss of wage-earning capacity attributable to the subject injury nor to support a reasonable expectation that the work-related injury will cause a loss in wage-earning capacity in the future. Therefore, I find that Claimant is not entitled to a *de minimis* award.

4. Entitlement to Medical Expenses

Section 7(a) of the Act provides in relevant part that the "Employer shall furnish medical, surgical, and other attendance or treatment […] for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). In order for medical expenses to be assessed against an employer, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Reasonable and necessary medical expenses are those related to and appropriate for the diagnosis and treatment of the industrial injury. 20 C.F.R. § 702.402; *Pardee v. Army & Air Force Exchange Serv*., 13 BRBS 1130, 1138 (1981). A claimant establishes a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). Claimant carries the burden to establish the necessity of such treatment rendered for his work-related injury. *See generally Schoen v. U.S. Chamber of Commerce,* 30 BRBS 112 (1996); *Wheeler v. Interocean Stevedoring Inc*., 21 BRBS 33 (1988).

As I find that the Claimant's current condition is not causally related to or aggravated by the March 1999 injury or his ongoing work activities, Employer is not responsible for any medical expenses. Employer is only responsible for any unpaid medical expenses related to the March 1999 injury that were incurred between the March 1, 1999 injury and April 2, 1999 when he fully recovered from that injury.

ORDER

Based on the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED** that:

1. Reedsport Machine & Fabrication/SAIF Corp. shall pay Claimant temporary total disability benefits for a March 1, 1999 low back injury based on an average weekly wage of $596.27.

2. Employer shall pay Claimant or the medical provider, if unpaid, his reasonable medical expenses incurred with respect to his low back condition from March 1, 1999 to April 2, 1999, as the nature of Claimant's work-related disability required and as described in the decision above.

3. Employer is entitled to a credit for all disability payments previously made to Claimant in relation to the March 1, 1999 injury.

4. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the OWCP shall be paid on all accrued benefits computed from the date each payment was originally due to be paid.

5. The District Director shall make all calculations necessary to carry out this Order.

6. Counsel for Claimant shall within 20 days after service of this Order submit a fully supported application for costs and fees to counsel for Employer and to the undersigned Administrative Law Judge if Claimant has gained any monetary benefit from this Decision and Order such that Claimant be deemed the prevailing party, if any. Within 20 days thereafter, counsel for Employer shall provide Claimant's counsel and the undersigned Administrative Law Judge with a written list specifically describing each and every objection to the proposed fees and costs. Within 20 days after receipt of such objections, Claimant's counsel shall verbally discuss each of the objections with counsel for Employer. If the two counsel disagree on any of the proposed fees or costs, Claimant's counsel shall within 15 days file a fully documented petition listing those fees and costs which are still in dispute and set forth a statement of Claimant's position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by counsel for Employer. Counsel for Employer shall have 15 days from the date of service of such application in which to respond. No reply will be permitted unless specifically authorized in advance.

IT IS SO ORDERED.

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GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California